83-267

NO. _____

UNITED STATES SUPREME COURT

OCTOBER TERM 1983

JANICE BROWNFIELD,

PETITIONER,

VS.

CITY OF LAGUNA BEACH, STANLEY SCHOLL, ALFRED THEAL, LAGUNA PUBLISHING COMPANY, THOMAS MICHAEL EGGERS, VERNON SPITALERI AND MARJORIE SPITALERI,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

JANICE BROWNFIELD
P.O. BOX 979
LAGUNA BEACH, CA
92652
(714) 558-3944

I. QUESTIONS PRESENTED FOR REVIEW

A. District court erred in granting respondents' motion for summary judgment (Rule 56(c) of the Federal Rules of Civil Procedure) because there are genuine issues of material fact which require a trial.

B. District court manifestly abused its discretion in denying petitioner's motion to alter summary judgment (Rule 59(e) of the Federal Rules of Civil Procedure) because it evaluated evidence, as would a trier of fact.

C. Appellate court, in affirming the district court's grant of summary judgment and denial of reconsideration, overlooked and misapprehended the law and the facts (Rule 40 of the Federal Rules of Appellate Procedure).

D. Appellate court erred in denying petitioner's request for a rehearing (Rule 40 of the Federal Rules of Appellate Procedure).

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B. April 28, 1980 order by U.S. District Court, Central District of California, dismissing 42 U.S.C. 1985(3) cause of action and allowing 42 U.S.C. 1983 cause of action to stand.

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V. JURISDICTIONAL STATEMENT

Petitioner JANICE BROWNFIELD seeks a review of the following decisions of the U.S. Court of Appeals for the Ninth Circuit:

A. March 31, 1983 Memorandum decision; and

B. May 19, 1983 Order Amending

Memorandum on Denial of Rehearing.

The First Amendment to the United States Constitution, 42 U.S.C. 1983, and Rule 17 of the Supreme Court Rules confer on the United States Supreme Court jurisdiction by writ of certiorari to review the March 31, 1983 and May 19, 1983 judgments entered by the U.S. Court of Appeals for the Ninth Circuit.

VI. CONSTITUTIONAL PROVISIONS

The pertinent texts of the constitutional provisions are cited in the appendix. They are as follows: First and Fourteenth Amendments to the United States Constitution, 28 U.S.C. 1331(a), 28 U.S.C. 1343, 42 U.S.C. 1983, and 42 U.S.C. 1988.

VII. STATEMENT OF CASE

On or about June 16, 1975 petitioner JANICE BROWNFIELD became an intern for

the News-Post newspaper, published by respondent LAGUNA PUBLISHING COMPANY. Her six-week internship was obtained by personal initiative to apply as credit toward her Bachelor of Arts degree in journalism from Pepperdine University.

Included among her duties as an intern was coverage of news generated by the municipal government of respondent CITY OF LAGUNA BEACH. Upon completion of the internship Pepperdine University was sent a letter by respondent THOMAS MICHAEL EGGERS, then the managing editor of the News-Post, recommending an "A" grade for her internship credit and stating that because of her abilities she would begin full-time employment there following graduation on or about August 3, 1975.

As a full-time employee, petitioner continued the same duties she had per-

formed as an intern, working in both the editorial and the production departments of the newspaper.

As an editorial department employee petitioner reported on the activities of the Laguna Beach city government, including respondents STANLEY SCHOLL and ALFRED THEAL. After reporting on the city government for about a year, petitioner was verbally assaulted by SCHOLL, then the city's municipal services director. He shouted, "You don't write stories the right way!" He also told her that he had already told respondent VERNON SPITALERI, then the News-Post publisher, about his displeasure with her.

Within a few months, on or about October 14, 1976, petitioner was informed by a witness that the city government was pressuring the newspaper to terminate her employment. On or about October 25, 1976, petitioner was informed by the

witness that on the following day there was going to be a meeting to discuss her employment. The meeting was to be attended by her employer, VERNON SPITALERI, and by municipal respondents SCHOLL and THEAL, who was then the city manager. As scheduled, the meeting was held on October 26, 1976. Five (5) days later, on October 31, 1976, petitioner was informed by witnesses that the city government was pressuring the newspaper to terminate her.

Just one month later, on November 26, 1976, petitioner was notified by respondent EGGERS of her termination from the News-Post editorial department effective December 1, 1976. The reason given was that he was reorganizing the structure of the editorial department. Petitioner continued to perform her duties in the News-Post's production department until January 20, 1977 when she was terminated from all employment, including an independent

contractor position as a distributor, by respondent MARJORIE SPITALERI, vice president of LAGUNA PUBLISHING COMPANY and wife of VERNON SPITALERI. Petitioner was not given any reason, any severance pay or any advance notice.

Consequently, petitioner has since been unable to obtain any gainful employment in her chosen field--the journalism profession.

On November 27, 1979 petitioner filed a complaint in the U.S. District Court, Central District of California, charging the respondents with conspiracy to violate her civil rights because her news stories were not pleasing to the city government. The complaint was amended on February 20, 1980. On a motion by the respondents, the district court on April 21, 1980 ordered that petitioner's 42 U.S.C. 1985(3) cause of action be dismissed without leave to amend. The

remaining cause of action was and is a First Amendment violation with damages recoverable under 42 U.S.C. 1983.

On May 24, 1982 the respondents filed a Federal Rules of Civil Procedure motion for summary judgment. Counsel for petitioner filed an opposition on June 1, 1982 which did not include all of the evidence available to petitioner but did present the circumstantial evidence and the United States Supreme Court and appellate court decisions which preclude summary judgment in cases analogous to petitioner's. On June 17, 1982 the district court ruled that there was no genuine issue of material fact and therefore entered summary judgment in favor of the respondents.

Petitioner then took over the prosecution of her case <u>in propria persona</u> and filed on June 28, 1982 a motion for reconsideration pursuant to Federal Rules

of Civil Procedure Rule 59(e). Petitioner presented additional circumstantial evidence, as well as evidence in the form of declarations and documents destroying the respondents' credibility in the reasons they gave at their depositions for her termination from employment. On July 26, 1982 the district court denied petitioner's motion to alter summary judgment, categorizing all of the evidence submitted as irrelevant and/or inadmissible hearsay.

On August 19, 1982, petitioner filed a notice of appeal of the July 26, 1982 order, which encompasses the June 17, 1982 order.

On March 11, 1983 a three-member panel of the U.S. Court of Appeals for the Ninth Circuit discussed the case, displaying ignorance about which cause of action was left to stand on April 21, 1980 yet at the same time stating that "the briefs

cover the issues quite adequately". The case was then taken under submission. On March 31, 1983 the appellate court issued a Memorandum affirming the district court's June 17, 1982 and July 26, 1982 orders.

On April 14, 1983, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, petitioner submitted a petition for rehearing to the appellate court on the basis that the court overlooked and misapprehended points of law and of fact as most readily evidenced by its Memorandum's incorrect references to "city council members", rather than to "city officials". (No city council members were parties to the appeal process.) On May 19, 1983 the appellate court issued an Order Amending Memorandum on Denial of Rehearing, substituting "city officials" for "city council members" but denying the petition for rehearing in banc.

Petitioner now seeks the United States Supreme Court's review on writ of certiorari pursuant to Rule 17.1(a) of the Supreme Court Rules, which declares as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

VIII. ARGUMENT

A. District court erred in granting respondents' motion for summary judgment (Rule 56(c) of the Federal Rules of Civil Procedure) because there are genuine issues of material fact which require a trial.

At the same time the respondents made their motion for summary judgment, petitioner was represented by counsel, who presented the district court with the following material fact:

Municipal respondent SCHOLL, then the city's municipal services director, had expressed displeasure with petitioner's news stories and that in October 1976 he arranged a meeting with her employer, newspaper respondent VERNON SPITALERI, then the News-Post publisher, to complain about her stories and to pressure him to terminate her employment, which came about on November 26, 1976 and went into effect on December 1, 1976.

Summary judgment, when there is a genuine issue for trial, is not available

under Rule 56 of the Federal Rules of Civil Procedure. The United States Supreme Court has established that a genuine issue may be determined by one or more of the following factors: circumstances, credibility or conspiracy. The appellate courts have followed those guidelines in reversing summary judgments granted by district courts.

1. The circumstances of a case can establish a genuine issue for trial.

One of the exhibits to petitioner's opposition to the respondents' motion for summary judgment was the following declaration of witness Dallas Anderson:

> On October 25, 1976 John McDowell, then a city councilman for the City of Laguna Beach, California, informed me that a meeting between Mr. STANLEY SCHOLL, Mr. ALFRED THEAL and Mr. VERNON SPITALERI was going to be held the following day to discuss JANICE BROWNFIELD.

While the above declaration is hearsay, the district court should have allowed

it as admissible hearsay because the respondents have not submitted any evidence challenging its "equivalent circumstantial guarantees of trustworthiness", a requirement of Rule 803(24) of the Federal Rules of Evidence. 6 Moore's Federal Practice 2d, 56-1322, also states that such an affidavit may be included at summary judgment proceedings as well as at trials.

Firsthand accounts of respondent SCHOLL's activities were submitted to the district court in the form of declarations by petitioner and witness Dave Cunningham, a former News-Post reporter and co-worker of petitioner. Both declared that it was SCHOLL's custom to regularly attempt to manipulate News-Post personnel in order to control the content of the News-Post.

The purpose of the declarations by Anderson, Cunningham and petitioner was

to establish that SCHOLL's actions in controlling the press and ultimately in pressuring the News-Post to terminate petitioner were done "under the color of law" as defined in 42 U.S.C. 1983. As a result of SCHOLL's actions, petitioner suffered a deprivation of a constitutional right, the freedom to report for the News-Post without governmental interference or retaliation. A reporter's First Amendment rights are not limited to freedom from prior restraint and denial of access. Just like any other citizen in any other occupation or activity, reporters also have the First Amendment rights of freedom of expression, speech and press without retaliation by any other citizen or entity. When one of the parties involved in the retaliation is a government employee acting "under the color of law", that is, using his government position to exert control, then the victim may seek a redress

of grievance through 42 U.S.C. 1983, as petitioner is doing.

The circumstances of and leading up to the October 1976 meeting of respondents SCHOLL, THEAL and SPITALERI, should have caused the district court to conclude that there was a genuine issue for trial. The district court should have considered the following:

a) What was the motive of municipal respondent SCHOLL in yelling at petitioner that she did not write stories the "right way"?

b) What was SCHOLL's motive in telling petitioner that he had already registered his complaint with her employer, newspaper respondent SPITALERI:

c) What was SCHOLL's motive in arranging a meeting with her employer in October 1976?

d) What motivated the newspaper

respondents to notify petitioner in November 1976 that she was being terminated from employment?

The genuine issue of material fact which existed at the time the district court granted summary judgment in favor of the respondents was their motive in secretly meeting in October 1976 and discussing petitioner. The motive, petitioner contends, was to eliminate her for the exercise of her First Amendment rights. The respondents have contended that the purpose of the meeting was to have lunch and that an inaccurate article allegedly written by petitioner was discussed. Throughout this litigation the respondents have never produced the alleged article nor specified its subject matter. At his deposition, respondent SPITALERI was only able to say that he thought petitioner wrote the alleged article.

In granting summary judgment for the

respondents, the district court chose to believe their reason for the October 1976 meeting. As in the case of Egger v. Phillips, 669 F.2d 497 (7th Cir. 1982), the district court chose to credit the respondents' instead of the petitioner's interpretation of several key points. Egger, a former FBI agent, appealed in propria persona from a district court's grant of summary judgment in favor of the defendant, plaintiff's former supervisor. The defendant had found plaintiff's submission of memos against personnel to be disruptive, therefore transferring and subsequently dismissing him for his First Amendment activity. The appellate court found that the district court's weighing of the evidence was impermissible on a motion for summary judgment where the underlying issue is one of motive or intent.

Similarly, the motives involved in the circumstances of Ring v. Schlesinger,

502 F.2d 479 (U.S. App. D.C. 1974), had not been considered by the district court when it granted summary judgment in favor of the defendants. In reversing the decision, the appellate court ruled that summary judgment was not to be used in resolving a constitutional issue of whether a plaintiff had been unlawfully dismissed from her employment in retaliation for her exercise of freedom of speech rights. "We think that there is a genuine dispute as to whether appellant was dismissed on an impermissible basis--as a reprisal for the exercise of constitutionally protected rights," the appellate court stated at page 490.

At the summary judgment hearing in the present case the district court chose to believe the argument submitted by the respondents, which consisted solely in their denial of any wrongdoing and in their reliance on the case of Graseck v.

Mauceri, 582 F.2d 203 (2nd Cir. 1978) cert. denied 439 U.S. 1129. The district court used Graseck in the findings of uncontroverted facts and conclusions of law in the present case. While it is true that the United States Supreme Court denied the Graseck petition for a writ of certiorari, the case is completely irrelevant to the case at hand. The Graseck case was dismissed only after two (2) trials on the merits and an appellate review of the trial transcripts. Such a case cannot be compared to the instant case, which has not yet been allowed even one (1) trial.

Graseck was an attorney whose employer discharged him, claiming that he was a disruptive influence. The respondents' attorneys in the present case have attempted to cast petitioner in the same light. Attorneys for the respondents stated in their motion for summary judg-

ment that petitioner was discharged from her position as a News-Post reporter because she was a disruptive influence upon her fellow workers. The only testimony and affidavits offered by the respondents have been that of their own, which is inadmissible hearsay.

The plaintiff in Porter v. Califano, 592 F.2d 770 (5th Cir. 1979), a First Amendment case on appeal from a summary judgment, established that the defendants had given inadmissible hearsay testimony in claiming that she had been suspended from employment because her speech had disrupted the office where she worked.

Another First Amendment case, Clark v. Mann, 562 F.2d 1104 (8th Cir. 1977), was appealed following a trial verdict. Clark, not Graseck, is analogous to the instant case because the circumstances of their terminations are similar. One of the plaintiffs in the Clark case was

Tyler, a school teacher who had received a good evaluation from the principal three (3) months before a student boycott. In response to a request for solutions to the problems which led to the boycott, Tyler submitted her written proposal. The next month the principal gave her a much lower evaluation and recommended that her contract not be renewed, which it was not when the school board met and voted the following month, citing the low evaluation. The appellate court overturned the trial court's conclusion that Tyler's exercise of her First Amendment rights and racial considerations were not factors in the board's decision to not renew her contract.

In comparison, the petitioner herein was considered to be a very competent journalist before the municipal respondents had her terminated because they were not pleased with her coverage of city government news.

2. The credibility of witnesses can establish a genuine issue, precluding summary judgment.

The United States Supreme Court held in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), that a summary judgment was not the proper way to resolve a conspiracy case which relied on the credibility of the witnesses. The court ruled as follows:

> The existence or non-existence of a conspiracy is essentially a factual issue that the jury, not the trial judge should decide. In this case, petitioner may have had to prove her case by impeaching the store's witnesses and appealing to the jury to disbelieve all that they said was true in the affidavits. The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses and all the possibilities of considering the human factors should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment. At page 176.

Likewise, in the case of Fisher v. Shamburg, 624 F.2d 156 (10th Cir. 1980), the appellate court followed the Adickes guideline that a trial, not summary judgment, is to be held in deciding credibility in a conspiracy case. The Fisher court ruled as follows:

> Here, the issue of conspiracy must be resolved on the credibility of the witnesses. Credibility is properly evaluated by the trier of fact. Eagle v. Louisiana & Southern Life Insurance Co., 464 F.2d 607 (10th Cir. 1972) Summary judgment should not be used to prevent the necessary examination of conflicting testimony and credibility in the crucible of a trial. National Aviation Underwriters, Inc. v. Altus Flying Service, Inc., 555 F.2d 778, 784 (10th Cir. 1977). At page 162.

The Ninth Circuit Court of Appeals in Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981) ruled that on a motion for summary judgment neither appellate courts nor trial courts are permitted to weigh the evidence, pass upon credibility, or

speculate as to the ultimate findings of fact. Summary judgment also is not appropriate "where a trial, with its opportunity for cross-examination and testing the credibility of witnesses might disclose a picture substantially different from that given by the affidavits". United States v. Perry, 431 F.2d 1020 (9th Cir. 1970).

The United States Supreme Court has recognized the fact that alleged conspirators need to be cross-examined in a trial so that their credibility can be tested. In Poller v. Columbia Broadcasting, 368 U.S. 464 (1962), the Court reversed summary judgment for defendants with the following ruling:

> We believe that summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their

> credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'. At page 473.

The district court in the instant case apparently decided that the affidavits of the municipal respondents and the newspaper respondents--the alleged conspirators--were more credible than the claim of the petitioner. Such a determination is for the trier of fact. The appellate court in Mazaleski v. Treusdell, 562 F.2d 701, 717 (U.S. App. D.C. 1977), ruled that summary judgment is generally inappropriate "when motivation is involved and credibility becomes of critical importance, or when essential facts are solely within the control of the moving party". The court further stated that the "only likely avenue of success" for the plaintiff, a discharged employee, "lay in making credibility an

issue because resolution of the constitutional issue required a determination of state of mind".

The district court in the present case sided with the respondents in stating that there was no relationship between the October 1976 meeting and the November 1976 termination notice. A trier of fact is to draw the inferences from those two (2) events. Where different inferences can be drawn from conflicting affidavits and depositions, summary judgment should not be granted, the appellate court ruled in Romero v. Union Pacific Railroad, 615 F.2d 1303, 1309 (10th Cir. 1980). "This is particularly so where an issue turns on credibility," the court added.

At the summary judgment hearing on June 14, 1982, the district court in the instant case erred in stating that petitioner had already had an opportunity to cross-examine respondents SCHOLL and

THEAL. Petitioner never had the opportunity to cross-examine THEAL at a deposition, much less at a trial as required by Adickes, supra, because the respondents' attorneys failed to produce him. The deposition testimonies of respondents SCHOLL and SPITALERI conflict as to whether respondents THEAL and/or EGGERS were also at the October 1976 meeting at which the petitioner was discussed.

The appellate court in Rhodes v. Robinson, 612 F.2d 766, 773 (3rd Cir. 1979), held that such a conflict precluded summary judgment since affidavits from both parties differed as to whether a security officer had spoken to a disciplinary committee about appellant Rhodes. The appellate court therefore concluded that from the affidavits and evidence of the security officer's intent to confer with the committee on the subject of appel-

lant's misconduct, there was a genuine issue of fact which precluded summary judgment.

Consequently, the district court in the present case erred in deciding on the credibility of the respondents and in assuming that respondent THEAL had been produced for a deposition.

3. A conspiracy can establish a genuine constitutional issue which requires a trial for determination.

Petitioner alleged that the respondents conspired to violate her First Amendment rights when they met in October 1976 and agreed to terminate her employment.

The appellate court in Ferguson v. Omnimedia, Inc., 469 F.2d 194, 198 (1st Cir. 1972), concluded the following:

> In a conspiracy case, agreement is rarely out in the open, and proof of conscious complicity may depend upon the careful marshalling of circumstantial evidence and the opportunity to cross-examine hostile witnesses...As in the present case summary judgment procedures

are often not a sufficient substitute for trial.

See also Tillamook Cheese and Dairy Assn. v. Tillamook County Creamery Assn., 358 F.2d 115 (9th Cir. 1966).

The appellate court in Morales v. Vega, 579 F.2d 677 (1st Cir. 1978), followed the guidelines of Adickes, supra, in stating that a summary judgment is not to be turned into a trial by affidavit. The plaintiff in Morales had brought a civil rights action challenging his discharge from employment and on appeal claimed that the district court erred in granting summary judgment for the defendants. In reversing the decision, the appellate court ruled that the genuine issue of material fact was an issue involving the defendants' motive and state of mind concerning the existence of a conspiracy against the plaintiff.

The appellate court in National Gas Appliance Corp. v. Manitowoc Co., 311 F.2d

896 (7th Cir. 1962), ruled that a plaintiff does not have to prove a conspiracy; a conspiracy can be inferred from the evidence of more than a coincidental sequence of events. Applied to the instant case at the summary judgment hearing, it was more than a coincidence that four (4) weeks after the October 1976 meeting that petitioner was notified of her termination of employment.

The fact that respondents met secretly in October 1976 to discuss petitioner is sufficient to establish the existence of a civil rights conspiracy, according to the decision of Crowe v. Lucas, 595 F.2d 985, 993 (5th Cir. 1979).

As the foregoing argument shows, the district court in the present case failed to recognize the genuine issue of material fact that the October 1976 meeting attended by the respondents resulted in petitioner's termination

notice the following month as evidenced by the credibility of the respondents concerning the circumstances of the conspiracy.

B. District court manifestly abused its discretion in denying petitioner's motion to alter summary judgment (Rule 59(e) of the Federal Rules of Civil Procedure) because it evaluated evidence, as would a trier of fact.

Following the district court's grant of summary judgment on June 14, 1982, petitioner substituted herself as her legal representative. She then filed a motion to alter summary judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure on the basis that her former counsel had not submitted all of the evidence because it was not "known" or "available" to him, according to dictionary definitions, because he did not understand its significance.

Petitioner produced twenty-four (24) exhibits, including affidavits of five (5) former News-Post co-workers of petitioner

who declared under oath that they never said or heard that she was a disruptive influence, thus discounting the respondents' reliance upon Graseck, supra, and discrediting the newspaper respondents' testimony that a secondary reason for petitioner's termination was that she was a disruptive influence on her co-workers. The respondents have never produced any affidavits or testimony from any of the newspaper's employees.

The newspaper respondents' credibility was completely obliterated by another exhibit, the affidavit of a former News-Post employee who began work in the editorial department the day that petitioner's termination went into effect, December 1, 1976. Marilyn Angell's declaration under oath proves that as of December 1, 1976 respondent LAGUNA PUBLISHING COMPANY was spending more on editorial department salaries than it

had previously. Consequently, the newspaper respondents' testimony that the primary reason for petitioner's termination was due to financial problems is completely erroneous.

Another exhibit of significance is that portion of respondent SCHOLL's deposition testimony which makes more binding the causal connection between the October 1976 meeting and the November 1976 termination notice. SCHOLL testified as follows:

> I was not in the habit of talking with Mr. SPITALERI about any subject because we did not have occasion to speak...(H)is position was publisher of the newspaper, so I did not see him more than perhaps once a year.

Since SCHOLL admitted to seeing SPITALERI not more than once a year his evil intent concerning petitioner's First Amendment right was so strong that he arranged to have a private lunch with him in October 1976 to discuss petitioner.

SCHOLL's custom of manipulating the News-Post, evidenced in the declarations of former News-Post reporters Dave Cunningham and petitioner, was denied by SCHOLL at his deposition. A column written by News-Post reporter Dorothy Korber about SCHOLL's control of the press was entitled "A Master of Manipulation" and was another one of the exhibits to petitioner's motion to alter summary judgment. Another exhibit was a second column by Korber entitled "All I Want for Christmas..." In tribute to SCHOLL, who was leaving to go to work for the City of Santa Monica, she wrote, "To STAN SCHOLL, a full-time photographer assigned to him by the Santa Monica Evening Outlook" (a newspaper). Both columns are clearly based on SCHOLL's attempts to control and manipulate the press, including the News-Post. At his deposition, however, SCHOLL displayed his lack of credibility by denying

that he ever contacted the News-Post. On page 16 of his deposition transcript he answered as follows:

> Q. Do you recall calling Ms. Korber and giving her any suggestions for any stories?
>
> A. No.
>
> Q. Do you recall calling JANICE BROWNFIELD and suggesting any stories to her?
>
> A. No.

Korber's column, "A Master of Manipulation", however, states that "He (SCHOLL) expects us to document on film every city project, no matter how mundane or trivial". SCHOLL contacted the News-Post regularly concerning the publicity he wanted given to his municipal projects. His denial is a mensuration of his credibility concerning his pressuring the newspaper respondents to terminate petitioner.

Another exhibit submitted with the motion for reconsideration by petitioner was her declaration that on October 14,

1976 and October 31, 1976 she learned that the municipal respondents were pressuring the newspaper respondents to terminate her. That information was passed on to her by witnesses Dallas Anderson and Trevor Cushman, whose declarations were additional exhibits. Rule 805 of the Federal Rules of Evidence allows such "hearsay within hearsay". The circumstances of October 14, 25, 26 and 31, and November 26, 1976 are more than a coincidental sequence of events. They represent the respondents' conspiracy to have petitioner terminated from her editorial department employment on December 1, 1976.

By labeling as inadmissible hearsay or irrelevant all of the circumstantial evidence and the twenty-four (24) exhibits, including declarations of five (5) News-Post co-workers and three (3) more witnesses, the court manifestly

abused its discretion in refusing to alter the summary judgment entered in favor of the respondents.

The Ninth Circuit Court of Appeals has held that "whether the judge misused or abused his discretion, of necessity, depends upon the facts of each case". States Steamship Company v. Philippine Air Lines, 426 F.2d 803 (9th Cir. 1970) at page 804. The "district court's findings of fact will be upheld unless clearly erroneous" and the "district court's conclucions of law are subject to broad review and will be reversed if incorrect", the appellate court in Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300 (5th Cir. 1982), stated at pages 303, 304. By signing the findings of uncontroverted facts and conclusions of law, the district court in the present case erred in agreeing that Graseck, supra, is dispositive, as shown earlier in this

argument, and therefore abused its discretion.

The United States Supreme Court has ordered that a civil rights plaintiff proceeding in propria persona, as is petitioner, must be afforded great solicitude. Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978) cert. denied 99 S.Ct. 464. Petitioner therefore should not suffer an injustice because she submitted the supplemental evidence within ten (10) days after the district court's grant of summary judgment and replacing her counsel with herself. See also Bowles v. Six States Coal Corporation, In re, 64 F. Supp. 651 (W.D. PA. 1946).

C. Appellate court, in affirming the district court's grant of summary judgment and denial of reconsideration, overlooked and misapprehended the law and the facts. (Rule 40 of the Federal Rules of Appellate Procedure)

Appellate review of a summary judgment is included in an appellate review of a denial of a reconsideration of the

judgment because the two (2) decisions are intertwined. In its Memorandum decision dated March 31, 1983, the Ninth Circuit Court of Appeals stated, "(W)e have considered her contention that summary judgment was improperly granted to the defendants". The appellate court continued as follows:

> This argument lacks merit. Even if all of the facts plaintiff alleged are true, she still failed to establish any conduct by city council members in conjunction with her employer, which impinged on her free expression rights in violation of 42 U.S.C. 1983. See Graseck v. Mauceri, 582 F.2d 203 (2nd Cir.) cert. denied, 439 U.S. 1129 (1979). Moreover, the facts she alleged do not establish that the newspaper took any action pursuant to a custom or usage with the force of law. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 167, 90 S.Ct. 1598, 1613 (1970). Nor do they establish action by city council members pursuant to an official municipal policy, as required by Monell v. Department of Social Services of New York, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38 (1978). The district court therefore properly granted summary judgment to all defendants. Affirmed.

The appellate court obviously did not read the briefs submitted to it or it would have known that none of the municipal respondents were or are "city council members". The court obviously was made confused by the respondents' briefs which falsely stated, among other things, that petitioner is claiming a theory of respondeat superior. Petitioner claims a theory of negligence under Monell supra, in which the United States Supreme Court held that local governmental entities are "persons" for purposes of 42 U.S.C. 1983.

Throughout this litigation petitioner has contended that it was municipal respondent SCHOLL, not the News-Post newspaper, whose "custom" and "usage" it was to control and manipulate the newspaper respondents.

In Phaby v. KSD-KSD-TV, Inc., 476 F. Supp. 1051 (E.D. Missouri 1979), the

press was held liable for terminating a television news reporter as a result of pressure from the city's Sheriff Percich.

> If defendant KSD (the 'press' in that case) acted in concert with defendant Percich in the allegedly unlawful termination of plaintiff's employment, its action would also be considered state action. At page 1053.

That theory has been upheld by the United States Supreme Court in Dennis v. Sparks, 449 U.S. 24 (1980), which stated the following at pages 27, 28:

> (T)o act 'under color of' state law for Section 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challeged action, are acting 'under color' of law for purposes of Section 1983 actions.

The appellate court in the present case, however, completely overlooked the relevant case law, including Donovan v. Mobley, 291 F. Supp. 930 (C.D. Cal.

1968), Aff'd. 433 F.2d 738 (9th Cir. 1970); and Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978).

In its March 31, 1983 Memorandum affirming the district court's denial of petitioner's Rule 59(e) Federal Rules of Civil Procedure motion for reconsideration, the appellate court relied on three (3) cases, as previously cited. They are Graseck, supra; Adickes, supra; and Monell, supra.

In Graseck, supra, the Second Circuit Court of Appeals concluded that the discharge of a Legal Aid Society attorney from his government employment, "far from being a reaction to judicial pressure, resulted from the independent managerial decision of the Society". At page 205. The defendants in Graseck stated that the plaintiff was discharged because of his alleged inability to work with colleagues and to follow established rules, continual

absences from assigned areas, and repeated interferences with colleagues' clients.

In the instant case the respondents' attorneys have relied upon Graseck, beginning with their motion for summary judgment. The respondents' counsel have tried to establish that petitioner was discharged from her newspaper employment not because of any pressure by respondents CITY OF LAGUNA BEACH, SCHOLL and THEAL, but because she was a disruptive influence on her fellow employees. The respondents themselves did not make any such allegation in their affidavits supporting their motion for summary judgment. (The only affidavits they submitted were their own.) Although Rule 56 of the Federal Rules of Civil Procedure requires defendants making a summary judgment motion to prove that there is no genuine issue of material fact, the district court ignored that

basic requirement and ruled in favor of the respondents. Without one (1) scintilla of evidence to support the reliance on Graseck, the district court chose to believe the respondents and use Graseck in the findings of uncontroverted facts and conclusions of law.

Within the allowed ten (10) days following entry of summary judgment, petitioner dismissed her counsel and filed a Rule 59(e) Federal Rules of Civil Procedure motion for reconsideration. It was not petitioner's responsibility then or at the summary judgment hearing to prove that there are genuine issues of material fact. Nonetheless, in her motion for reconsideration petitioner presented evidence which had never before been submitted to the district court or to the respondents. That evidence included declarations of five (5) former News-Post co-workers stating that they never found or heard

of petitioner to be a disruptive influence. Even though the district court had believed the respondents' attorneys when they implied in their motion for summary judgment that petitioner was discharged for being a disruptive influence, the district court then ruled at the Rule 59(e) Federal Rules of Civil Procedure hearing that the five (5) declarations contradicting that allegation were irrelevant.

The second case cited by the appellate court in its March 31, 1983 Memorandum is Adickes, supra. The petitioner in that case was a white school teacher who was refused service in respondents' lunchroom when she was accompanied by six (6) black students and was arrested for vagrancy when she left. The district court in Adickes had directed a verdict in favor of the respondents and the appellate court had affirmed the decision. The

United States Supreme Court reversed and remanded the decision and stated that "private persons involved in such a conspiracy are acting 'under color' of law and can be held liable under Section 1983". At page 145. The Adickes court went on to cite the Poller, supra, decision regarding credibility of witnesses.

The district court in Adickes had taken away the jury's responsibility of deciding on credibility. The district court in the present case did likewise. Both the district court and the appellate court in the instant case misapprehended Adickes in ignoring the credibility guideline established by Adickes, and misunderstanding the "custom or usage" guideline cited by Adickes. If either court had read the Adickes case it would know that the "custom or usage" matter arose from the fact that the lunchroom personnel (the private persons) refused to

serve petitioner after a police officer (the state) stepped into the lunchroom. "Custom or usage" in Adickes meant a habitual practice of violating citizens' rights by conspiring to refuse service to white citizens in the company of blacks. In the instant case it was the "custom or usage" of SCHOLL (the state) to control the newspaper (the private persons), including his conspiring with the newspaper respondents to terminate petitioner from her employment.

The third case cited by the appellate court in the March 31, 1983 Memorandum is Monell, supra. In that case the petitioners were pregnant government employees compelled by official policy to take unpaid leaves of absence before required for medical reasons. The Monell case was submitted by the respondents in an effort to remove respondent CITY OF LAGUNA BEACH from all liability for

actions by its employees and officials, respondents SCHOLL and THEAL. The respondents' attorneys have asserted that SCHOLL and THEAL were not following any official municipal policy when they pressured the newspaper respondents to terminate petitioner. SCHOLL has testified that there was no policy regarding his dealings with the press, including the newspaper respondents. Consequently, the CITY OF LAGUNA BEACH can be held liable, according to Monell, at page 659, as follows:

> (L)ocal governments, like every other Section 1983 'person', may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such custom has not received formal approval through the government's official decision-making channels. (Emphasis added)

Petitioner contends that SCHOLL, as the CITY OF LAGUNA BEACH municipal services director, and THEAL, as the

CITY OF LAGUNA BEACH city manager, held such positions of employment and public office that their actions represented the CITY OF LAGUNA BEACH. That contention is supported by the Monell court, at page 694, as follows:

> (I)t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.

Lack of an official policy, as testified to by SCHOLL, is the official policy.

In summary, the appellate court misapprehended the cases of Graseck, supra; Adickes, supra; and Monell, supra; and overlooked the cases of Phaby, supra; Donovan, supra; and Johnson, supra. The latter three (3) cases, although not decided by the United States Supreme Court are more analogous to the present case than the three (3) former cases. The

Dennis, supra, case was decided by the United States Supreme Court and is dispositive regarding "custom or usage". The appellate court also overlooked points of fact in that it so insufficiently read the briefs that it did not know there are no city council members who are parties to this litigation.

D. Appellate court erred in denying petitioner's request for a rehearing (Rule 40 of the Federal Rules of Appellate Procedure.

Because the Ninth Circuit Court of Appeals displayed, in the March 31, 1983 Memorandum, its ignorance about the parties to this litigation, misapprehended case law, and overlooked points of fact, petitioner filed a petition for rehearing on April 14, 1983. On May 19, 1983 the Court of Appeals issued an Order Amending Memorandum on Denial of Rehearing, substituting "city officials" for "city council members" but denying the petition for rehearing in banc.

Since the appellate court did not know there were no city council members who are parties to this case, it could not possibly have thoroughly read the briefs, studied the case law or determined the facts of this case.

The appellate court blindly rubber-stamped the district court's two (2) decisions--the summary judgment entered June 17, 1982 in favor of the respondents, and the July 26, 1982 denial of petitioner's motion for reconsideration. As a result, the appellate court sanctioned the district court's departure from the accepted and usual course of proceedings. Therefore, the United States Supreme Court's power of supervision is needed to correct their errors.

E. Conclusion

Through this petition for writ of certiorari, the United States Supreme Court is requested to correct the errors

made by the district court and by the appellate court. Petitioner contends that the district court erred in granting summary judgment in favor of respondents in that there are genuine issues of material fact. The district court subsequently demonstrated a manifest abuse of discretion when it denied petitioner's motion for reconsideration in that the additional evidence submitted is irrelevant and inadmissible. The appellate court sanctioned the district court's errors by misapprehending the case law and overlooking points of fact. The appellate court did not know the identities of the parties, the importance of credibility, the elements of a conspiracy, the meanings of "custom or usage" and "under color of law", and the liability of municipalities as "persons". The appellate court so far departed from the accepted and usual course of proceedings

that it failed to sufficiently read the briefs submitted and chose to blindly rubber-stamp the district court's decisions.

Beginning with the summary judgment hearing, the district court did not follow the dictates of Rule 56 of the Federal Rules of Civil Procedure and granted summary judgment for respondents even though genuine issues of material fact exist. The district court acted as jury and allowed a trial by affidavit. The respondents did not prove, as required, that there are no genuine issues of material fact. Their reliance on Graseck, supra, the attorney discharged for being a disruptive influence on his fellow employees, is immaterial and irrelevant to this litigation. The respondents submitted no other affidavits but their own. They did not submit any affidavits by petitioner's former News-Post co-workers.

The district court ignored the issue that municipal respondents SCHOLL and THEAL met with newspaper respondent SPITALERI in October 1976 and pressured him to terminate her from employment as a News-Post reporter. The district court also ignored the fact that the federal appellate courts and the United States Supreme Court have established that such an issue is to be determined by one (1) or more of the following criteria:

1) Circumstances--SCHOLL yelled at petitioner that she did not write stories the "right way". Witness Anderson informed petitioner on October 25, 1976 that the next day SCHOLL and THEAL were going to meet with SPITALERI to discuss her. On November 26, 1976, one (1) month after the meeting, petitioner was notified of her termination.

2) Credibility--Witnesses need to be cross-examined in the crucible of a trial.

The district court erred in assuming that municipal respondent THEAL had been deposed. Adickes, supra; Eagle, supra; Fisher, supra; Mazaleski, supra; National Aviation, supra; Rhodes, supra; and Romero, supra.

3) Conspiracy--Motive and intent are to be determined at a trial. Crowe, supra; Ferguson, supra; Fisher, supra; Morales, supra; National Gas, supra; Poller, supra; and Tillamook supra.

After dismissing her counsel and filing a motion to alter summary judgment, petitioner should have been given leeway as a civil rights litigant proceeding in propria persona in that the district court should have ruled the late submission of evidence as admissible, not causing her to suffer an injustice due to her former attorney's lack of understanding. Gordon, supra. Bowles, supra.

While the district court had believed the respondents' attorneys' claim that petitioner had been discharged for being a disruptive influence on her fellow employees, the district court erred at the reconsideration hearing by ruling as irrelevant five (5) declarations of petitioner's former News-Post co-workers stating that they never found or heard of her to be a disruptive influence.

The district court also erred in ruling as irrelevant the declaration of witness Marilyn Angell, who began work in the News-Post editorial department on December 1, 1976, the day petitioner's termination went into effect. Prior to the reconsideration hearing, Angell's declaration had not been produced or mentioned in this litigation. At their depositions, newspaper respondents EGGERS and SPITALERI testified that the primary reason for petitioner's termination was

financial problems, necessitating the elimination of one (1) editorial department employee. Angell's and petitioner's declarations prove that as of December 1, 1976 there was not only the same number of employees but more money was being spent on editorial department salaries as well.

The district court further erred in ruling as inadmissible hearsay the declarations of petitioner and witnesses Anderson and Cushman. The hearsay is admissible, according to Rules 803(24) and 805 of the Federal Rules of Evidence, and 6 Moore's Federal Practice 2d, 56-1322, because the respondents have never attempted to disprove the guarantee of trustworthiness of the testimony. The three (3) hearsay declarations establish the more than coincidental sequence of events, as follows, that led to petitioner's

unlawful termination:

1) Mid-1976: SCHOLL yelled at petitioner that she did not write stories the "right way".

2) October 14, 1976: Witnesses Anderson and Cushman were informed that the city government (SCHOLL, THEAL and CITY OF LAGUNA BEACH) was pressuring the newspaper (SPITALERIS, EGGERS and LAGUNA PUBLISHING COMPANY) to terminate petitioner's employment.

3) October 25, 1976: Witness Anderson informed petitioner that SCHOLL and THEAL were going to meet with SPITALERI the next day to discuss petitioner.

4) October 26, 1976: SPITALERI met with SCHOLL and THEAL (as admitted to by SCHOLL and SPITALERI at their depositions).

5) October 31, 1976: Witnesses Anderson and Cushman told petitioner that the city government was pressuring

the newspaper to terminate her employment.

6) November 26, 1976: The newspaper, via EGGERS, notified petitioner of her termination of employment.

The district court erred in ruling that all of the above evidence was inadmissible because it was hearsay. Rule 803(24) of the Federal Rules of Evidence allows hearsay unless the respondents prove it false, which they have not even attempted. Rule 805 allows "hearsay within hearsay".

As previously argued, the appellate court then wrongly affirmed the district court's decisions. The appellate court did not sufficiently read the briefs to know that there are no "city council members" who are parties to this litigation. Petitioner contends that a trial is necessary to establish the genuine issues of material fact that the CITY OF LAGUNA BEACH and THEAL, through SCHOLL,

pressured EGGERS and LAGUNA PUBLISHING COMPANY, through SPITALERI, to unlawfully terminate petitioner's employment. It was SCHOLL's "custom" to control the newspaper and his "usage" in forcing petitioner's termination. Adickes, supra. SCHOLL's conspiratorial actions were done "under color of law" and the CITY OF LAGUNA BEACH is also liable since, as SCHOLL testified, there was no official municipal policy for his dealings with the press. No official municipal policy for dealings with the press is the official governmental policy, according to Monell, supra.

The United States Supreme Court is requested to review and accept as dispositive the case of Porter, supra, in which the appellate court overturned a summary judgment because of the lack of credibility of the defendants, who were charged with violating the plaintiff's

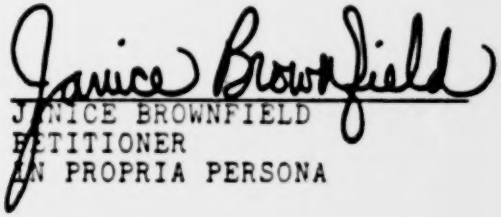
First Amendment rights. As in the Porter case, the district court in the present case chose to believe the employer defendants who offered only their own affidavits in the summary judgment motion. On page 778 the appellate court in Porter made the following determination:

> This record contains no evidence as to whether there was a measurable decline in the efficiency of the Program Center operations and whether that injury was caused by Porter. In fact the main evidence placed by the government in the record even indirectly on this critical factual dispute is the selectively reported, largely anonymous and generally inconclusive third-hand hearsay contained in a memo written by Bruce, an obviously biased source. Considering how may (sic) objective measures and more impartial witnesses were available, the government's exclusive use of this kind of vague and biased evidence is especially suspect.
>
> As a general rule a court should use Rule 56 summary judgment most sparingly in a First Amendment case such

> as this involving delicate constitutional grounds, complex fact situations, disputed testimony, and questionable credibilities. This is especially true where the only affidavits supporting the motion for summary judgment come from officials who are attempting to silence a subordinate.

Petitioner therefore requests the United States Supreme Court to reverse the appellate court's decision of May 19, 1983 and remand this case for a trial on the merits by presentation of the more than coincidental sequence of events, cross-examination of the conspirators and testing of the credibility of the witnesses.

Respectfully submitted,



JANICE BROWNFIELD
PETITIONER
IN PROPRIA PERSONA

DATED: AUGUST 15, 1983

IX. APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANICE BROWNFIELD, Plaintiff, vs. CITY OF LAGUNA BEACH, et al., Defendants.	)	June 14, 1982 Transcript of Proceedings No. CV 79-4590 AWT

Judge Presiding: A. Wallace Tashima

Counsel for Plaintiff: Garrett S. Gregor

Counsel for Defendants: Marc Winthrop
Paul Bickenbach

THE COURT: Counsel, have you all seen the tentative ruling?

MR. WINTHROP: Yes, we have, your Honor.

MR. GREGOR: Yes, your Honor.

THE COURT: I think in view of that, we should hear from the plaintiff.

MR. GREGOR: Yes, your Honor. Just briefly, I would invite the Court's attention to the declaration filed by Janice Brownfield wherein she discussed the alleged relationship, if you will, with

Mr. Scholl. I think it can be gleaned from that declaration that Mr. Scholl was not necessarily too appreciative of some of the articles that Miss Brownfield wrote. This combined with the deposition testimony of Mr. Scholl, wherein he discusses the fact that he had a meeting with Miss Brownfield's employer, Mr. Spitaleri, where they discussed the particular article written by Miss Brownfield. Obviously, in a case such as this, much of the evidence is going to be circumstantial based on the testimony of these witnesses. As I've set forth in my papers, I think that the credibility of these witnesses combined with the circumstantial nature of the evidence will necessitate a trial in order that the jury may adequately observe any demeanor and test the credibility of these named defendants. I think based on that motion, it should

be denied.

THE COURT: Tell me what the issue is on which the credibility is to be tested. In other words, what is the factual conflict? You believe whom and disbelieve whom?

MR. GREGOR: We believe Miss Brownfield and disbelieve Mr. Scholl, and I think plaintiff may get a verdict. Mr. Scholl--

THE COURT: She does not really contradict the essential factual showing which amounts to, I think, no evidence at all--no evidence at all that there was a conspiracy; is there? What evidence is there that could be believed that could establish a conspiracy?

MR. GREGOR: Well, the fact there was a meeting with Mr. Scholl and Mr. Spitaleri wherein it was discussed.

THE COURT: The meeting itself does not mean it is conspiratorial. There are specific affidavits that essentially

deny there was any conspiracy, and there is no showing on the other side that there was. All right. All she can show is there was a meeting.

MR. GREGOR: That's correct, your Honor.

THE COURT: A meeting is not a conspiracy. There has to be some showing, you know, ordinary conspiracy showing for an unlawful purpose or to achieve an illegal objective or to achieve a legal objective by some unlawful means. There is no showing of those elements at all. The only showing is there was a meeting. So if the jury were to believe her testimony completely, I think you still have to grant nonsuit for the close of the plaintiff's case. That is not sufficient. Can you show something else here that is proof of a conspiracy?

MR. GREGOR: Essentially, your Honor, we laid everything out in the papers. Our concern is cross-examination of Mr. Scholl

and Mr. Field (sic).

THE COURT: You have had that opportunity now at the deposition. There had been no admission on cross-examination, has there? I have not seen any that say yes, it is, in effect, not in so many words, but even by inference that there was conspiratorial conduct at any of these meetings.

MR. GREGOR: They denied it in the deposition.

THE COURT: That is exactly it. So you had your chance to cross-examine. Well, I will state for the record, I am going to have to grant the summary judgment for the defense. It seems to me, if you are interested in pursuing your claim on that basis, if that is all you can show, it is in the interest of everybody concerned to grant the summary judgment, because you are going to get the same result at the end of the trial. The

evidence is not sufficient on the plaintiff's part to contradict the showing of the defendants and to establish a prima facie case. So on that basis, if you think that's sufficient, then I think you are going to have to convince somebody else besides me. I am going to grant the motion for summary judgment on the basis that I just stated. I just think that, in effect, the denials by the defendant (sic) are not contradicted by any factual showing, so the motions from both groups of defendants are granted.

MR. WINTHROP: Thank you, your Honor.

MR. BICKENBACH: Your Honor, is that ruling for defendants to have their costs also?

THE COURT: They are the prevailing party, so they are entitled to costs, yes.

MR. WINTHROP: We previously submitted a judgment.

THE COURT: Yes. I am going to have to mess around with it a little bit to make sure it conforms to what I think the facts are and so forth, but it will be signed within the next couple of days.

MR. GREGOR: Thank you, your Honor.

MR. WINTHROP: Thank you, your Honor.

MR. BICKENBACH: Thank you, your Honor.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANICE BROWNFIELD, Plaintiff, vs. CITY OF LAGUNA BEACH, et al., Defendants.	June 14, 1982 Judgment for Defendants (Entered June 17, 1982) No. CV 79-4590 AWT

This action came on for hearing before the Court, Honorable Wallace A. Tashima (sic), District Judge, presiding upon the motion of all defendants for summary judgment, and the issues having been duly considered, findings of fact and conclusions of law having been prepared and signed by the Court and a decision having been duly rended in accordance therewith, it is ORDERED AND ADJUDGED that plaintiff take nothing and that the action be dismissed in its entirety on the merits and that the defendants

CITY OF LAGUNA BEACH, JOHN MC DOWELL, CARL JOHNSON, JR., JON BRAND, SALLY BELLERUE, PHYLLIS SWEENEY, LAGUNA PUBLISHING COMPANY, VERNON R. SPITALERI, MARJORIE SPITALERI, THOMAS MICHAEL EGGERS, STANLEY SCHOLL, and ALFRED THEAL recover of the plaintiff JANICE BROWNFIELD their costs of action.

DATED at Los Angeles, California, this 14th day of June, 1982.

/s/
Wallace A. Tashima (sic), District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANICE BROWNFIELD, Plaintiff, vs. CITY OF LAGUNA BEACH, et al., Defendants.	June 14, 1982 Findings of Uncontroverted Fact and Conclusions of Law No. CV 79-4590 AWT

This matter came on for hearing before the Honorable Wallace A. (sic) Tashima, District Judge, in his courtroom at 10:00 a.m. June 14, 1982, on the motion of all defendants for summary judgment. Plaintiff appeared by and through Beam, DiCaro, D'Antony & Stafford by Garrett S. Gregor her counsel of record. Defendants City of Laguna Beach, Sally Bellerue, Jon Brand, Carl Johnson, John McDowell, Phyllis Sweeney, Stanley Scholl and Alfred Theal appeared by and through Rutan & Tucker by Marc Winthrop

and Deborah Alley their counsel of record and defendants Laguna Publishing Company, Vernon Spitaleri, Majorie (sic) Spitaleri and Thomas Michael Eggers appeared by and through Tuverson & Hillyard by Paul Bickenbach their counsel of record. The Court having thoroughly considered the memoranda, affidavits, deposition transcripts and pleadings on file herein and the oral arguments of counsel now makes the following findings of fact and conclusions of law:

The following are found to be uncontroverted facts:

FINDINGS OF UNCONTROVERTED FACT

1. Plaintiff Janice Brownfield ("Brownfield") is and at all relevant times was a resident of the County of Orange, State of California.

2. Defendant City of Laguna Beach ("City") is a general law city created under the laws of the State of California.

3. Defendants Sally Bellerue, Jon Brand, Carl Johnson, John McDowell and Phyllis Sweeney were at all relevant times duly elected and acting members of the City Council of the City of Laguna Beach.

4. Alfred Theal was at all relevant times the City Manager of the City of Laguna Beach.

5. Stanley Scholl was at all relevant times the Director of Municipal Services of the City of Laguna Beach. (Defendants City of Laguna Beach, Sally Bellerue, Jon Brand, Carl Johnson, John McDowell, Alfred Theal, Stanley Scholl and Phyllis Sweeney are hereinafter referred to collectively as the "City defendants").

6. Defendant Laguna Publishing Company was at all relevant times a private California corporation with offices in Laguna Hills, California.

7. At all relevant times Laguna Publishing Company published a weekly news-

paper known as the News-Post, which is distributed in the City of Laguna Beach.

8. Defendant Vernon Spitaleri was at all relevant times the president of Laguna Publishing Company.

9. Defendant Marjorie Spitaleri was at all relevant times an officer of Laguna Publishing Company.

10. Defendant Thomas Michael Eggers was at all relevant times either the Managing Editor or Executive Editor of the News-Post (Laguna Publishing Company, Vernon Spitaleri and Thomas Michael Eggers are collectively referred to hereinafter as the "Newspaper defendants").

11. From approximately September 1975 through on or about December 1, 1976, Brownfield was employed by the Laguna Publishing Company as a newspaper reporter and a production worker. On or about December 1, 1976 Brownfield was removed from her duties as a reporter.

On or about January 20, 1976 (sic), Brownfield was terminated by Laguna Publishing Company as an employee of Laguna Publishing Company.

12. While employed as a reporter Brownfield's duties included, among other things, reporting on Laguna Beach City Council meetings and other political or local governmental affairs.

13. At no time did the City defendants or any of them conspire to cause the removal of Brownfield from her position as a newspaper reporter. There was not, at any relevant time, any conspiracy between City defendants and Newspaper defendants.

14. At no time did the City defendants or any of them attempt to cause or cause the removal of Brownfield from her position as a newspaper reporter.

15. At no time did the City defendants, or any of them, exert or attempt to exert any influcence (sic) whatsoever on News-

paper defendants to induce them to remove Brownfield from her reporting duties.

16. At all relevant times the City of Laguna Beach placed its legal advertising in the News-Post.

17. At no time did the City defendants, or any of them, meet, secretly or otherwise with the Newspaper defendants to induce them to assist said defendants in any conspiracy to remove Brownfield from her position as a reporter.

18. At no time, either at a meeting or otherwise did the City defendants, or any of them, advise the Newspaper defendants, or any of them, that unless Brownfield was removed from her position said defendants and Laguna Publishing Company would lose any economic or political benefits conferred upon them by said defendants and the City of Laguna Beach.

19. At no time did the City defendants, or any of them, exert any influence or place any pressure on the Newspaper defendants, or any of them, to obtain the removal of Brownfield from her reporting duties.

20. At no time did the City defendants, or any of them, demand, request or even suggest to the Newspaper defendants, or any of them, that Brownfield be removed as a reporter for the News-Post.

20. (Sic) To the extent that any of the foregoing Findings of Uncontroverted Fact shall hereafter be determined to be a conclusion of law, then it shall be deemed to be included in the conclusions of law.

CONCLUSIONS OF LAW

1. The Court concludes in all respects as set forth in the foregoing Findings of Uncontroverted Fact.

2. In order to recover under 42 U.S.C.

Section 1983, plaintiff must prove that defendants acted under color of law and that defendants' action caused plaintiff to be deprived of a constitutionally protected right.

3. Plaintiff has presented no evidence to support her contention that Newspaper defendants acted under color of law as required by 42 U.S.C. Section 1983. There is no proximate causal connection between acts under color of state law by City defendants and plaintiff's termination.

4. Plaintiff has presented no evidence to support her contention that any of the defendants acted to deprive her of any constitutionally protected right as required by 42 U.S.C. Section 1983.

5. No evidence supports plaintiff's contention that City defendants, directly or indirectly, caused her to be deprived of any constitutionally protected right, as required by 42 U.S.C. Section 1983.

6. The Newspaper defendants are private parties who cannot act under color of law within the meaning of 42 U.S.C. Section 1983 absent exceptional circumstances.

7. No exceptional circumstances are involved in this matter and, accordingly, the Newspaper defendants did not act under color of law with respect to any matter alleged by plaintiff. Grasek v. Mauceri (sic), 582 F.2d 203 (2d Cir. 1978), cert. denied, 439 U.S. 1129.

8. The termination of plaintiff's employment was an independent action of the Newspaper defendants.

9. The termination of plaintiff's employment was a private action.

10. The termination of plaintiff's employment did not deprive plaintiff of any constitutionally or legally protected right.

11. The City defendants' right to criti-

cize the press is protected by the First Amendment. Borrera v. Fasi (sic), 369 F. Supp. 906 (D. Hawaii 1974).

12. In view of the foregoing conclusions, plaintiff's action under 42 U.S.C. Section 1983 has no merit and defendants are entitled to judgment as a matter of law.

13. Defendants' affidavits establish that there is no genuine issue as to any material fact.

14. Plaintiff has not established the existence of a genuine issue as to any material fact.

15. Based on the foregoing conclusions, defendants are entitled to summary judgment.

16. The interests of justice and judicial economy would best be served by granting defendants' Motion for Summary Judgment.

17. In the event that any conclusions of law shall hereafter be determined to be

an uncontroverted fact, then it shall be deemed to be included in the Findings of Uncontroverted Fact.

Let judgment be entered accordingly.

Dated: Jun. 14, 1982

/s/
Wallace A. Tashima (sic)
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANICE BROWNFIELD Plaintiff, vs. CITY OF LAGUNA BEACH, et al., Defendants.	July 26, 1982 Transcript of Proceedings No. CV 79-4590 AWT

Judge Presiding: A. Wallace Tashima

Counsel for Plaintiff: Janice Brownfield
In Propria Persona

Counsel for Defendants: Marshall Pearlman
Teresa Williams

THE COURT: Good morning. Miss Brownfield, did you see the tentative ruling which was to deny your motion?

MISS BROWNFIELD: Yes, I have.

THE COURT: Basically, you know, for a motion to amend or alter judgment you have to show what the evidence is newly discovered, and that you or your attorneys could not have come upon it earlier. The

fact is very clear that they had it at that time. Do you want to argue it further?

MISS BROWNFIELD: It was my understanding that my former counsel did not understand the significance of the evidence presented to him; therefore, my paperwork already established the definitions between what was available or known to him.

THE COURT: Well, I can't agree with you that he didn't necessarily understand the significance of it. I can understand why he didn't use any of it because it is almost all hearsay--either hearsay or not relevant or not admissible. There is really no ground to alter or amend the judgment. First of all, there is no showing that this is evidence which in due diligence could not have been discovered earlier; in fact, it was known earlier. Second, even if produced at the hearing, it would not alter the out-

come because most is hearsay and not admissible--triple hearsay, quadruple hearsay--if not hearsay, totally irrelevant to the issues of this case. So the motion to alter or amend the judgment is denied.

MISS BROWNFIELD: May I ask the Court to take judicial notice of one thing?

THE COURT: Of what?

MISS BROWNFIELD: The fact that defendant Alfred Theal was never deposed, and the reason was that his attorneys failed to produce him, and he was listed on the joint discovery schedule filed with the Court in October 1980.

THE COURT: I cannot take judicial notice of that; but, if I did, it would not make any difference because there was ample opportunity for you and your several attorneys to take depositions. Matters were continued numerous times, and if your attorney at that time

thought it was important to do it, you could have moved to compel discovery and that was not done so far as I know. So it would not change the outcome of this decision. The motion is denied.

MISS BROWNFIELD: All right; thank you, your Honor.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANICE BROWNFIELD, Plaintiff, vs. CITY OF LAGUNA BEACH, et al., Defendants.	July 26, 1982 Order Denying Motion to Altar Summary Judgment No. CV 79-4590 AWT

This matter came on for hearing before the Honorable A. Wallace Tashima, District Judge, in his courtroom at 10:00 a.m., July 26, 1982, on plaintiff's motion to alter or amend the summary judgment entered in favor of defendants on June 17, 1982. The Court having duly considered the memoranda, affidavits, deposition transcripts, documentary evidence and pleadings on file herein, and the oral arguments presented, DOES HEREBY ORDER that the motion is DENIED.

DATED: Jul. 26, 1982

/s/
A. WALLACE TASHIMA
United States
District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANICE BROWNFIELD, Plaintiff, vs. CITY OF LAGUNA BEACH, et al., Defendants.	April 21, 1980 Transcript of Proceedings No. CV 79-4590 AWT

Judge Presiding: Mariana R. Pfaelzer

Counsel for Plaintiff: Roger N. Golden

Counsel for Defendants: Marc Winthrop
Joel Kuperberg
Arthur Tuverson

MR. WINTHROP: Good morning, your Honor. Marc Winthrop and Joel Kuperberg, of Rutan & Tucker, for defendants City of Laguna Beach, John McDowell, Carl Johnson, Jon Brand, Sally Bellerue, Phyllis Sweeney, Stanley Scholl, and Alfred Theal.

MR. TUVERSON: Good morning, your Honor. Arthur Tuverson for the newspaper defendants.

MR. GOLDEN: Roger Golden for the Plaintiff, your Honor.

THE COUI T: All right. I do not think that there is any cause of action under Section 1985(3). There's no point in going on with amending anything with respect to that. I am worried about some of the parties under Section 1983, but there is enough alleged here, I think, to let the plaintiff go forward. This might be a motion-for-summary-judgment case as to some of these people under 1983, because we're just looking at the allegations now, and there probably is enough of an allegation to hold everybody in under 1983, but the 1985(3) cause of action has got to be dismissed without leave to amend. Now, I do think that plaintiffs have a terrible burden here. Let's assume that the plaintiff stays in under 1983. How long that plaintiff is going to stay in, I

really don't know. This is a hard case to prove, very hard case to prove, and I don't know--there are so many internal inconsistencies in this that I'm worried about how long you can stay here, especially as to some of these parties, the publishing company, for example. All right.

MR. GOLDEN: Well, your Honor, with respect to the 1985(3) claim, I would just like to inquire as to the basis for the dismissal.

THE COURT: Well, that's not a class. That's just not the kind of a class that fits here, and I know that you would argue that there are a class of reporters who write articles that are critical of local government. That's your argument, isn't it? Well, I don't think that's the kind of class that's contemplated by 1985(3).

MR. GOLDEN: Well, your Honor, with

respect to the kind of class that 1985(3) contemplates, I think in Berkowitz v. Seltzer, which is cited to the court, I think that class--

THE COURT: That's the class of professors that you're talking about.

MR. GOLDEN: That was the class of those teachers or professors who wanted to speak to the Central Intelligence Agency. I think that class is at least as broad and at least as ill-defined, if that's the basis for your Honor's ruling, as a class of investigative newspaper reporters. I think that, in fact, a class of investigative newspaper reporters is a much more easily ascertainable class, because you can tell who they are by what they do, and there's an objective public method by which to make that determination. I don't think that the defendants' position with respect to classes under 1985(3)

that it has to be essentially gereric in origin is correct.

THE COURT: No, no. What I am talking about is that in looking at this De Santis case where the question is: Is this the kind of class that has been afforded special federal existence in protecting their civil rights? And I don't see that group of reporters in that light. That's my problem.

MR. GOLDEN: Well, your Honor, if I may, the purpose of the First Amendment is to protect newspaper reporters in this position.

THE COURT: I know.

MR. GOLDEN: I think if one is to concede that the First Amendment discrimination against persons exercising First Amendment rights gives rise to potentially a 1985(3) claim, I think that once you've conceded that, you have to concede that the First Amendment is intended to pro-

tect newspaper reporters, among others. And so for the defendants to cite the De Santis case as the basis to dismiss the 1985(3) claim seems to me interprets that case, because the court goes to great pains to say that Congress has never taken the position that homosexuals are a protected group. Well, I think the Constitution takes the position that newspaper reporters are a protected group. The Supreme Court in New York Times--U.S. v. New York Times says:

> "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment is adopted against the widespread use of common law of seditious libel to

punish the dissemination
of material that is em-
barrassing to the powers
that be."

And that's what this case is about, your Honor. Our position is not that this involves the loss of a private job, because if that's what this were about, we wouldn't be here. What we're saying is that the loss of the job was the means to the end of suppressing the press, and the press is protected. And the press, I would submit, your Honor, is a suffficiently definable class, that it is entitled to be protected by 1985(3). It is the kind of class that's contemplated by 1985(3). Historically, the press has been discriminated against, it's been abused, and that's the purpose of the First Amendment, and that is what I submit 1985(3) and the Civil Rights acts are intended to protect, are classes against whom

historically discrimination by the government has been directed.

THE COURT: I don't see it. Now, I'll hear from the other side on this point if there's anything that you want to say.

MR. WINTHROP: Well, we, of course, agree with your Honor that defining a class as the press generally is much too broad. It is not the kind of class which comes under the recent authority of De Santis, which required a suspect classification by Congress. Congress has never--or the courts have never denominated the press as some sort of a suspect classification.

THE COURT: Well, I suppose he's not talking about the press in general. He's talking about investigative reporters who go after local government.

MR. WINTHROP: Which depends on the government, depends on the issue. It's highly mootable. If this particular

individual feels that she's been suppressed, she doesn't need 1985 Supp. 3. The very idea that someone who generally criticizes can be a member of a class was disposed of in the Rodgers case, which we cited.

THE COURT: Well, I don't see it as a 1985(3) case, and I was very much inclined to let some of the defendants out even under 1983, but I won't do that yet. I'm inclined to think that there are some inconsistencies about the facts here, and there is enough stated in the complaint to get through that, it seems to me.

MR. WINTHROP: May I address that?

THE COURT: Yes, you may.

MR. WINTHROP: This is the second time around.

THE COURT: That's right.

MR. WINTHROP: The first time around, the court held that there was no First

Amendment claim stated.

THE COURT: Yes.

MR. WINTHROP: I've read both complaints, and I really can't see how the First Amendment claim has been improved upon. What we have here is a woman who was a reporter, whose newspaper fired her. That's all that was alleged the first time around. Much as counsel protests to the contrary, the newspaper was a private newspaper. This woman lost her job. This woman was not the press. She was not the newspaper. The newspaper is the one--is the entity that fired her. How she can be before the court now claiming to have been deprived of freedom of the press really escapes me. This is what was alleged the first time around. The court found it insufficient. This is what we're confronted with again. I don't see any way in which the complaint has been supplemented with respect

to the claim of a loss of First Amendment rights.

THE COURT: Well, I'm going to let her stay in under 1983, but how long she's going to be able to exist there--you haven't taken her deposition yet, have you?

MR. WINTHROP: No, we have not.

THE COURT: And what I'm saying is that as a pleading matter, it seems to me she can stay in thus far under 1983, not under 1985(3), and then I'm inviting some motions for summary judgment after her deposition is taken.

MR. GOLDEN: Your Honor, may I--

THE COURT: Yes.

MR. GOLDEN: With respect to that, we were unable to agree as to the order of the depositions.

THE COURT: All right.

MR. GOLDEN: Obviously, in a case of this nature where we're alleging a con-

spiracy, and as your Honor well knows, conspiracies--the conspirators are not going to come out and volunteer information to my client.

THE COURT: Hardly.

MR. GOLDEN: I would request that I be allowed to take the defendants' depositions first so that the--because if we're going to base this solely on my client's depositon, a motion for summary judgment at this point and time, without the opportunity to do some discovery, I think it's going to be very difficult for her to provide very concrete facts other than the facts which she has at her disposal, which admittedly are limited.

THE COURT: Well, she's obviously got to have a change to take some discovery, too, but what is going to happen in this discovery, I really can't say. I'm not saying that she's foreclosed from taking

discovery, and obviously if they had taken her deposition and then you hadn't had any discovery, that would be your answer. You'd say, "Well, I can't answer that motion now because I haven't had any discovery." But I am just telling you this is a tough case to deal with from your standpoint.

MR. GOLDEN: I understand that, your Honor.

THE COURT: All right. You prepare the order, will you, counsel?

MR. WINTHROP: Yes, your Honor.

THE COURT: It's granted as to 1985(3) and denied as to 1983.

MR. GOLDEN: Thank you, your Honor.

MR. WINTHROP: Thank you, your Honor.

THE COURT: Thank you.

MR. GOLDEN: Your Honor, how much time will they have?

THE COURT: Well, how much time?

MR. WINTHROP: Twenty days.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANICE BROWNFIELD, Plaintiff, vs. CITY OF LAGUNA BEACH, et al., Defendants.	April 28, 1980 Order re Motion to Dismiss First Amended Complaint (F.R.C.P. 12(b)(6) No. CV 79-4590 MRP

At Los Angeles, California, in this District on the 28th day of April, 1980, This matter came to be heard on the 21st day of April, 1980, at 9:30 a.m. before the Honorable Mariana R. Pfaelzer in her courtroom upon the motion of defendants City of Laguna Beach, John McDowell, Carl Johnson, Jr., Jon Brand, Sally Bellerue, Phyllis Sweeney, Stanley Scholl and Alfred Theal, to dismiss plaintiff's first amended complaint for failure to state a claim upon which relief can be granted. The moving parties appeared by

and through Marc Winthrop and Joel D. Superberg of Rutan & Tucker, their attorneys of record; defendants Laguna Publishing Company, Vernon Spitaleri, Marjorie Spitaleri and Michael Eggers, who joined in the Motion to Dismiss, appeared by and through Art Tuverson of Tuverson & Yager, their attorneys of record; plaintiff and responding party, Janice Brownfield, appeared by and through Roger Golden, her attorney of record. The court having read and considered the First Amended Complaint on file, the Motion to Dismiss and memoranda of points and authorities submitted by counsel, having heard and considered the argument of counsel and being fully advised in the premises, it is hereby ORDERED:

1. The Motion to Dismiss is granted as to the Second Cause of Action, which is dismissed without leave to amend;

2. The Motion to Dismiss is denied as

to the First Cause of Action and defendants shall have twenty (20) days to answer.

April 28, 1980

/s/
Mariana R. Pfaelzer
District Judge

APPROVED:

ROGER N. GOLDEN, a Professional Corporation

By /s/
Roger Golden, Attorney for plaintiff Janice Brownfield

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JANICE BROWNFIELD, Plaintiff-Appellant,	)	March 11, 1983 Transcript of Proceedings
vs.	)	No. 82-5783
CITY OF LAGUNA BEACH, et al., Defendants-Appellees.	)	

JUDGE SCHROEDER: There is counsel here present for the City of Laguna Beach; is that also correct?

MR. BICKENBACH: That's correct, and for the defendant newspaper and Mr. and Mrs. Spitaleri and Mr. Eggers, too.

JUDGE SCHROEDER: Does the court have any questions which they--which it wishes to address to either of the defendants?

JUDGE PREGERSON: Well, the briefs cover the issues quite adequately.

MR. BICKENBACH: I think we're willing to submit on the briefs, your Honor. I--Mrs. Alley for the City defendant, I think just had another case she wanted to bring to your attention.

JUDGE SCHROEDER: If you have a supplemental citation, would you give it to the clerk.

MRS. ALLEY: Certainly.

JUDGE SCHROEDER: And felt--she has little gummed sheets that you can fill out and give to the court, and we'll receive them.

MRS. ALLEY: All right. Thank you, your Honor.

MR. BICKENBACH: Thank you very much.

JUDGE THOMPSON: There is a matter that isn't covered by the briefs that interests me, and that's that after reviewing the whole record, I can't find any action under color of state law under 1983 and under 1985. I don't

believe that newspaper reporters are a class that can be designated as being discriminated against. So I don't see how these states are praying for release, but that's not argued very extensively in any brief that I read.

MRS. ALLEY: Your Honor, the City's brief does go into that question quite extensively, and we have argued consistently that there was no action under color of law and that therefore, she cannot maintain action under 42 USC 1983.

JUDGE SCHROEDER: The allegation I suppose--I guess was a conspiracy, that's--

MRS. ALLEY: Well, the allegation under 42 USC 1985 was dismissed.

JUDGE SCHROEDER: Yes.

MRS. ALLEY: The only remaining allegation was under 1983.

(Unintelligible.)

JUDGE SCHROEDER: Yes.

MRS. ALLEY: Thank you, your Honor.

JUDGE SCHROEDER: Thank you.

MR. BICKENBACH: Thank you.

JUDGE SCHROEDER: Then the case will be submitted and we will move to the next case in the calendar.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JANICE BROWNFIELD, Plaintiff-Appellant, vs. CITY OF LAGUNA BEACH, et al., Defendants-Appellees.	March 31, 1983 Memorandum No. 82-5783 D.C.# CV 79-4590 AWT

Appeal from the United States District Court for the Central District of California, A. Wallace Tashima, District Judge, Presiding, Submitted March 11, 1983

Before: SCHROEDER and PREGERSON, Circuit Judges, and THOMPSON*, District Judge.

The question in this appeal is whether the trial court abused its discretion in denying the plaintiff's motion under Fed. R. Civ. P. 59 to amend or alter the judgment. Denial of the motion was proper since

*Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

the district court was not required to consider late filed affidavits in opposition to summary judgment. See Fed. R. Civ. P. 56(c); Clarke v. Montgomery Ward & Co., 298 F.2d 346, 349 (9th Cir. 1962). Nor did the plaintiff's submissions warrant consideration as newly discovered evidence. The district court correctly determined that their lateness was not excused, and that the evidence was inadmissible. See 11 C. Wright & A. Miller, Federal Practice and Procedure Section 2808 (1973); United States v. Bransen, 142 F.2d 232, 235 (9th Cir. 1944): cf. Blair Foods v. Ranchers Cotton Oil, 610 F.2d 665, 667 (9th Cir. 1980) (inadmissible hearsay cannot be considered in summary judgment proceedings). Although the plaintiff did not file a notice of appeal from the summary judgment order itself, we have considered her contention that summary judgment

was improperly granted to the defendants. This argument lacks merit. Even if all of the facts plaintiff alleged are true, she still failed to establish any conduct by city council members, in conjunction with her employer, which impinged on her free expression rights in violation of 42 U.S.C. Section 1983. See Graseck v. Mauceri, 582 F.2d 203 (2d Cir.), cert. denied, 439 U.S. 1129 (1979). Moreover, the facts she alleged do not establish that the newspaper took any private action pursuant to a custom or usage with the force of law. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 167, 90 S. Ct. 1598, 1613 (1970). Nor do they establish action by city council members pursuant to an official municipal policy, as required by Monell v. Department of Social Services of New York, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38 (1978). The district

court therefore properly granted summary judgment to all defendants. Affirmed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JANICE BROWNFIELD, Plaintiff-Appellant, vs. CITY OF LAGUNA BEACH, et al., Defendants-Appellees.	May 19, 1983 Order Amending Memorandum on Denial of Rehearing No. 82-5783 D.C.# CV 79-4590 AWT

Before: SCHROEDER and PREGERSON, Circuit Judges, and THOMPSON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.

*Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by deisgnation.

App. P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The panel has voted to amend the memorandum disposition to substitute "city officials" for "city council members" in the second paragraph of the memorandum at lines 5 and 12-13.

CONSTITUTIONAL PROVISIONS

First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1331(a):

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. 1343:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be com-

menced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28. U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1988:

...In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.